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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IVA MAY HARVEY, a widow, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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A Reply Brief was filed on behalf of certain Petitioners on August 27, 1982. In order to avoid repetition of arguments raised therein, Petitioners represented by the undersigned counsel incorporate by reference and adopt the arguments raised in that brief. Additional arguments are set forth below.

I. THE GOVERNMENT HAS FAILED TO DEMONSTRATE AN OVERRIDING FEDERAL INTEREST IN THE LANDS AT ISSUE TO JUSTIFY APPLICATION OF FEDERAL COMMON LAW TO DETERMINE TITLE THERETO.

Neither this Court's decision in California ex rel. State Lands Commission, ___ U.S. ___, 50 U.S.L.W. 4672 (June 18, 1982), rendered shortly after the filing of the Petition for Writ of Certiorari in this case, nor its earlier decision in Wilson v. Omaha

Indian Tribe, 442 U.S. 653 (1979), supports Respondent's argument that federal common law, rather than state law, provides the rule of decision for determination of title to the lands at issue here. To the contrary, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), demands that state law determine questions of property ownership, unless some overriding federal interest requires a different result. 429 U.S. at 378. See Wilson, 442 U.S. at 669. Such overriding federal interests have not been shown by Respondent to exist here. Reliance on Wilson and State Lands Commission is therefore misplaced.

In Wilson, federal common law was applied because otherwise, the

government's title to Indian Reservation lands would have been divested. It was not only that the federal government had never parted with title to the subject lands, but also that the Indians' right to the property depended on federal law, which established the overriding federal interest sufficient to justify application of federal common law. 442 U.S. at 670.

In the instant case, although the federal government never parted with land north of the river, it did do so with respect to land south of the river, thereby knowingly subjecting determination of title to that land to application of state law. More importantly, as distinguished from Wilson, application of federal law in the instant case is

not necessary to maintain the federal interest. 1/ Its application merely results in a windfall to the government, at the expense of private parties who have always had legitimate expectations that their title would be determined according to state law, and who would have been correct in that expectation absent the mere coincidence of federal ownership on the opposite bank of the river. Cf. Wilson, 442 U.S. at 674.

This Court has scrupulously avoided choice of law which would result in such a windfall. See Corvallis, 429 U.S. at 370; Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 322, 328 (1973). In fact,

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1/ Application of state law in Wilson would have caused a substantial forfeiture of federal lands.

this Court has suggested that in determining whether to apply the doctrine of accretion or avulsion, the relative interests of the competing parties must be considered. See Bonelli, 414 U.S. at 328-29. [2/] Cases cited by both parties demonstrate choice of law being made in such a manner as to avoid working a substantial forfeiture. See, e.g., State Lands Commission, 50 U.S.L.W. at 4674; Wilson, 442 U.S. at

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2/ At trial, Petitioners' proposed jury instruction to this effect was rejected. Respondent's reference to the proposed instruction as an "invitation . . . to decide the case on the basis of sympathy," Respondent's Brief at 12 n.9, ignores not only the language in Bonelli cited above, but also the references thereto in Corvallis. 429 U.S. at 370. This aspect of Bonelli, i.e., application of the federal common law of accretion, was not overruled by Corvallis.

671; Nebraska v. Iowa, 406 U.S. 117 (1972).

This Court's decision in State Lands Commission adds nothing to Respondent's case insofar as the overriding federal interest asserted there, i.e., the boundaries of the international sea, was quite clearly,

> too close to the vital interest of the nation in its own boundaries to allow it to be governed by any but the 'supreme law of the land.'

State Lands Commission, 50 U.S.L.W. at 5674, quoting, Hughes v. Washington, 389 U.S. 290, 293 (1967). State Lands Commission merely recognizes that Corvallis did not overrule Hughes sub silentio. See State Lands Commission, 50 U.S.L.W. at 4674. Cf. Corvallis, 429 U.S. at 383 (Marshall, J., dissenting).

Federal ownership along a waterway hardly rises to the same level of interest as the location of the international boundary. Respondents would create an exception to Corvallis, based on mere federal ownership, an interpretation which was specifically rejected in Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966). In that case, involving rights associated with mineral leases on public lands, it was argued that:

> because leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved.

384 U.S. at 68. In refusing to supplant state law, this Court stated that:

> Apart from the highly abstract nature of this interest, there has been no showing that state

law is not adequate to achieve it.

Id.

In sum, invocation of federal common law is justified upon a showing of not merely a federal interest, but an overriding one. Respondent having failed to demonstrate an overriding federal interest, Corvallis requires that state law, and in particular that of California, govern in this case.

II. ASSUMING, ARGUENDO, THAT FEDERAL COMMON LAW APPLIES IN THIS CASE, STATE LAW SHOULD REMAIN THE RULE OF DECISION.

Even when the federal interest justifies application of federal common law, state law may be borrowed as the federal rule of decision. 3/ See

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3/ Choice of federal or state law is based on consideration of whether a (continued)

Wilson, 442 U.S. at 673; State Lands

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uniform national rule is necessary, the impact on federal policy or functions, and the impact of a federal rule on existing relationships under state law. See Wilson, 442 U.S. at 673. Reference to state law in the case at bar would not frustrate federal policy or functions because the title to lands which the federal government had a legitimate interest in maintaining, i.e., those north of the river at the time of the patent, are not at issue and are fully preserved. Gaining a windfall at the expense of private landowners can hardly be said to constitute an overriding federal policy. See Board of County Commissioners v. United States, 308 U.S. at 352 (state law absorbed as federal rule because state interest not inconsistent with federal policy). That there is no need for a uniform national rule and that a federal rule is likely to have an adverse effect on existing relations under state law is demonstrated by the fact that property ownership has traditionally been considered a matter of state law. See Wilson, 442 U.S. at 674; Corvallis, 429 U.S. at 378; Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring).

Commission, 50 U.S.L.W. at 4674; [4] Board of County Commissioners v. United States, 308 U.S. 343 (1939). Nevertheless, the district court, in applying federal common law, failed to consider applicable state law, particularly that of California, which has a paramount interest as the state in which the land is located. [5] In fact, the only issue

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4/ Though this Court failed to adopt California law with respect to artificial accretion as a rule of decision in State Lands Commission, it did not foreclose the possibility of doing so in some future, more appropriate, case. See 50 U.S.L.W. at 4675.

5/ Nor did the court consider a potentially dispositive exception to the federal common law rule of accretion which this Court expressly recognized in Corvallis.

> [W]here a river changes its main channel, not by excavating, passing over,

(continued)

which has ever been presented to a jury

> and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its water passing through the old main channel until the greater part of its water flows through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

429 U.S. at 367, quoting, Commis-
(continued)

in this case is whether the river moved slowly and imperceptibly or whether it moved suddenly. No consideration has been given to the cause of the shift or the manner in which the shift occurred,

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sioners v. United States, 270 F. 110 (8th Cir. 1920). Instruction as to this aspect of the federal law of accretion may well have proven decisive in light of Petitioner's evidence, duly noted by the Ninth Circuit, that there existed "an abandoned channel that the witnesses claimed could not have existed if the river had moved slowly by accretion." 661 F.2d at 772. Indeed, there was eyewitness testimony that during the flood of 1921, Harvey's Fishing Hole appeared as an island with the river running on both sides of it. RT 512.

Although legal issues not raised below are generally not considered on appeal, that rule is not inflexible, and this Court has stated its willingness to consider such issues in order to prevent manifest injustice. See Hormel v. Helvering, 312 U.S. 552, 556-57 (1941).

factors which are relevant under either state or federal law. 6/ Indeed, even if state law is not borrowed, the case at bar is appropriate for review by this Court to consider judicial development of this area of federal common law. Cf. State Lands Commission, 50 U.S.L.W. at 4674-75.

III. THE LAW OF CALIFORNIA, AS THE STATE WITH A PARAMOUNT INTEREST IN THE LANDS AT ISSUE, DETERMINES THE QUESTION OF TITLE TO LAND LOCATED THEREIN.

Respondent's reliance on Nebraska v. Iowa, 406 U.S. 117 (1972), in support of its argument that the law of Arizona, and not that of California, governs the instant case, is misplaced. In that

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6/ The Ninth Circuit conceded that under federal common law, the cause of the accretion was relevant. See 661 F.2d at 772, n.7.

case, it was held that an interstate compact between Nebraska and Iowa required title to land which was valid in Nebraska prior to the cession made by the compact, to be recognized in Iowa. The terms of the compact construed in that case expressly dictated such a result. See Wilson, 442 U.S. at 678. The Court refused to compel landowners to prove where the land was located at the time the compact was enacted when the states had entered into the compact because of their inability to do so.

The rationale of the Nebraska case dictates that California law apply because that is where the land at issue was clearly located prior to the enactment of the Arizona-California Compact. See United States v. Aranson, No. 77-

2295 (9th Cir. March 30, 1981), withdrawn, April 17, 1981. Respondent's reference to the law of the state in which the land was "originally" located, misconstrues the Court's use of that word in the Nebraska case. Since the issue in that case was one of construing the compact, the word "originally" simply refers to the time before the land was ceded to Iowa. Had the land shifted from Iowa to Nebraska prior to the compact ceding it back to Iowa, presumably Nebraska law would still have applied.

The case at bar calls for application of California law for several reasons. 7/ First, there is no question

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7/ General objection to applying state property law to federal lands were (continued)

that the land is currently located in California, a factor which was deemed controlling in Aranson. See App. at 148a. Second, the Arizona-California Compact, contrary to the one construed in the Nebraska case, only requires application of the law of the ceding state where failure to do so would prejudice the rights of persons claiming title to the ceded lands. See Petition at 29-30. Thus, a presumption is created favoring application of California law since that is the state where the land is now located. See Aranson, App. at 148a-149a. Third, the effect of this compact (as well as the one construed in the Nebraska case) is

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adequately addressed in Wilson. See 442 U.S. at 673-74.

to insure that titles good in the ceding state are not invalidated by virtue of the cession. Here, Petitioners have title to California land which is valid under California law, thus negating any application of the compact provision. And finally, having ceded the land at issue to California in 1966, Arizona simply has no interst justifying the extra-territorial application of its laws. Respondent argues that Petitioners should not be heard to object to application of Arizona law insofar as the original patent was issued there. Petitioners, however, have been within the jurisdiction of California since no later than 1966 and have every right to demand the protection of its laws.

The California law of accretion clearly recognizes an exception to the general rule where the accretion is artificially caused. That law, set forth in Cal. Civil Code § 1014, and has been construed in numerous state appellate cases, see, e.g., State v. Superior Court, 29 Cal.3d 240, 248, 172 Cal. Rptr. 713, 718, 625 P.2d 256, 261, cert. denied, 50 U.S.L.W. 3248 (1981); City of Long Beach v. Mansell, 3 Cal.3d 462, 469, 91 Cal. Rptr. 23, 28, 476 P.2d 423, 428 (1970); City of Los Angeles v. Anderson, 206 Cal. 662, 667, 275 P. 789, 791 (1929), by the court below, 661 F.2d at 770, and by this Court in State Lands Commission, 50 U.S.L.W. at 4673.

IV. THE COURT OF APPEALS INAPPROPRIATELY AND IMPROPERLY CONSTRUED ARIZONA LAW AS NOT DISTINGUISHING BETWEEN NATURAL AND ARTIFICIAL ACCRETIONS.

The Ninth Circuit held that the district court had committed no reversible error in applying the federal law of accretion, because it concluded that Arizona law was the appropriate rule of decision and that law paralleled the federal common law rule. 8/ 661 F.2d at 770-771. That decision was erroneous insofar as it misconstrued the significance of the Arizona Supreme Court decision in State v. Bonelli Cattle Co., 107

8/ Because the district court had refused to reconsider its decision after the Supreme Court overruled Bonelli, the principal issue on appeal was whether state or federal law applied. The actual content of Arizona law of accretion was only briefly addressed by the parties.

Ariz. 465, 469, 489 P.2d 699 (1971), holding that the general rule that accretions inure to the benefit of the upland owner, is not applicable where such accretions are artificially caused. See also Bonelli Cattle Co. v. Arizona, 414 U.S. at 328. 9/

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9/ As noted in the Petition, the Ninth Circuit relied on two other cases, both of which pre-dated Bonelli, and neither of which involved artificial accretion. Petition at 35-36.